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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ADIN FALKOFF -
PETITIONER

vs-

INTERNATIONAL BUSINESS MACHINES
CORPORATION -
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI: APPENDIX H

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October 16, 1995

94-7599 / 94-7601

To be argued by:
Plaintiff-Appellants
Time Requested: 15 Minutes

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Linda D. Misek-Falkoff and Adin Falkoff,

Plaintiff-Appellants Pro Se,

- vs -

International Business Machines Corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF PLAINTIFF-APPELLANT

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United States Southern District Court Clerk's Index No. 89 civ 6269 [VLB] 1994

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STATEMENT OF THE SUBJECT MATTER AND JURISDICTION, JUDGE AND CITATIONS

An employer, defendant-respondent International Business Machines Corporation, a recipient of federal financial assistance, intentionally subjected an employee, the principal plaintiff-appellant Dr. Linda Misek-Falkoff, to adverse discrimination because of her handicaps or perceived handicaps, failed to offer reasonable accommodation to her handicaps or perceived handicaps, failed to engage in dialogue for the purpose of determining reasonable accommodations, and secretly conspired to sever and did sever the employee from activities of the workplace in a prejudicial fashion, solely on account of her handicaps or perceived handicaps, although she was otherwise qualified to perform her job, all in violation of both federal and state Civil Rights statutes. Plaintiff is presently designated an "inactive employee" and characterized as having a disability that "prevents the taking of any employment for pay or profit." She has been barred from the workplace since 1987, and brought this action seeking reinstatement to active employment and other remedies.

The United States District Court, Southern District of New York, had jurisdiction and pendent jurisdiction over claims of handicap discrimination and violations of civil rights at plaintiff-appellant's workplace, based upon the provisions of 28 U.S.C. § 1331, because they arose under § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, the New York Executive Law 296(1)(a) and New York Civil Rights Law 40-c, in Westchester County, New York, within the Southern District of New York. The Docket Number in the court below is 89cv6269.

The Court of Appeals of the Second Circuit has jurisdiction in this matter based upon 28 U.S.C. § 1291, because a final judgment, following dismissal and summary judgment by Memorandum Order, was filed in the United States District Court, Southern District of New York on May 16, 1994, and notices of appeal by right were timely filed and fees paid at the USDC SDNY by the plaintiff-appellants on June 14, 1994.

The judge in the court below was the Honorable Vincent L. Broderick, and the decision on appeal has been reported in Misek-Falkoff and Falkoff v. International Business Machines Corporation,

854 F.Supp. 215 (S.D.N.Y. 1994); other reported decisions are Misek-Falkoff and Falkoff v. International Business Machines Corporation, 144 F.R.D. 48, (S.D.N.Y.1992), and Misek-Falkoff and Falkoff v. International Business Machines Corporation, 829 F.Supp. 660 (S.D.N.Y. 1993).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Preliminary Statement

This is a Civil Rights case[1] in the area of Handicap Discrimination in the workplace, wherein the employer claims that secretive decision-making, segregation, and banishment from the workplace can be an accommodation under the Rehabilitation Act and related statutes, whose primary purposes include integration of handicapped persons into society and deterrence of stereotyping, and whose implementation requires joint participation in determining suitable accommodations as well as in other matters seriously determinative of handicapped employees' status and standing in the workplace. The decision herein being appealed -- which holds that reasonable disagreement with management, and medical absences well within the bounds of an employer's documented sickness and accident benefit plan, are indicative of a handicapped persons disqualification for her job -- if allowed to stand as precedent, can only serve to chill choice or free speech for people with disabilities, and lock them out of the "marketplace of ideas." Under it, the Civil Rights thrust of the Disability laws stands to be vitiated, as Fifth Amendment equal protection and due process rights could be abrogated for employees with disabilities; especially for those with less obvious challenges, often called "hidden handicaps" in contrast with visible disabilities; and especially now, when so much of the increasingly automated American workplace is becoming more dependent upon telecommunication and the information industry, which often involves remote communications (telecommuting) and can tolerate such

[1] Plaintiffs believe that in the exercise of their constitutional rights of equal protection and due process there cannot be special interest privileged access to the courts, and that individuals stand on equal footing woth corporate entities.

handicaps -- not only tolerate them, but perhaps require such toleration, else become increasingly prone to re-instancing the gravamen (ills) instantiated by the present case.

Thus, in a work context increasingly crucial to the economy, the instant case tests generally whether secrecy and fiat by employers, rather than dialogue with a handicapped employee, can satisfy laws prohibiting discrimination and requiring integration; and specifically whether this particular employer management team violated the law by deliberately keeping from the handicapped employee knowledge of disability applications being made "on her behalf" (1985-1987), by in other ways setting up barriers to job performance and team interactions, destroying rather than preserving and improving the informational equivalent of "access ramps," and by imposing an adversely discriminatory severance from the workplace which could only be effectuated because the employee was acknowledged to be handicapped.

It also tests whether secrecy and purposeful deception can support equitable "affirmative" defenses; in particular, among other questions, whether defendants with "unclean hands" can properly invoke equitable defenses, and whether it is just and proper to grant prospective application to proceedings tainted by deliberate misrepresentation and withholding of information vital to the decision making process; and whether the rote use of only superficial criteria in applying New York's "pragmatic transactional analysis" approach to claim (or issue) preclusion is in keeping with the law, and whether such use is adequate for the satisfaction of due process and is in the interests of justice, when a closer look at the context and the totality of circumstances indicates otherwise.

In accordance with the express (since 1986) updates on Rehabilitation Act Law, a question is also raised as to the applicability of the Americans With Disabilities Act to a situation involving an "inactive employee."

Specific Questions To Be Decided

1. In determining whether a handicapped employee is "otherwise qualified" for her job, should greater weight be given to the employer's standard business records showing good performance and commendable conduct in the workplace, offered in evidence by the non-movant plaintiff, than to ad hoc hearsay documents offered by the

movant defendant alleging poor performance and behavioral problems in the workplace, purposely prepared to promote and justify questionable secret decisions detrimental to the employee? Does this disagreement in the evidentiary material present a genuine issue of material fact requiring a trial?

The district court improperly answered in the negative on both parts of this question.

2. Is it adversely impacting discriminatory treatment, as asserted by the non-movant plaintiff, to suddenly separate a handicapped employee from the workplace by secretly determining that she has a disability that "prevents the taking of any employment for pay or profit" under the terms of the employer's self-insured Medical Disability Income Plan (MDIP), and in violation of the employer's own standard procedures deliberately fail to offer her the options of resigning or being simply fired without prejudice, and then not only concealing from her the intended permanent nature of the separation but explicitly leading her to believe that she was not precluded from reinstatement to active status; or is this an accommodation within the meaning of the Rehabilitation Act, as asserted by the movant defendant, because the MDIP provides some monetary benefits?

The district court was silent on this question, but improperly ruled that if the employee was not "otherwise qualified" for her job this possibly inexcusable behavior of banishment on medical grounds by the employer could be legally supported.

3. Should preclusive force be given to prior litigation in which some of the facts used (as focus information) in that complaint are the same as facts mentioned (as background information) in the complaint in the instant case when, in addition, among other things under applicable New York law, the prior litigation was not fully litigated and had a different cause of action with completely non-overlapping requisite elements of proof? And should the plaintiffs be denied their "day in court" because they exercised their due process right to bring separate actions rather than combining the causes of action in one lawsuit?

The district court improperly ruled in the affirmative on both parts of this question.

4. Should prospective weight and preclusive force be given to prior litigation where there is evidence indicating that the decision therein was tainted because the defendant withheld information and

deliberately misled the court (and the plaintiff) on an issue material to the determination of that matter?

The district court was silent on this question.

STATEMENT OF THE CASE

The Nature Of The Case

This case claims unlawful discrimination and violation of civil rights by an employer who engaged in unequal and detrimental adverse treatment of an employee who suffered from certain medical problems which constitute handicaps as defined in 29 U.S.C. §§ 706(8)(B) and 794, and includes claims of loss of consortium by the employee's spouse who suffered such loss consequent to the discriminatory treatment complained of. For a period of about two years, the employer engaged in secret proceedings in the workplace leading to a planned stigmatized ouster of the employee based on her handicaps or perceived handicaps.

Some three years after the start of this action, the defendant moved under FRCP Rule 56(b) to dismiss the complaint on the basis of res judicata on account of an earlier case litigated in the New York Supreme Court, and to dismiss on the basis of summary judgment, claiming that the plaintiff was not "otherwise qualified" under the statutes, was not discriminated against, and that her medical condition was in fact accommodated at least to the legally necessary extent. Plaintiffs disagreed, both as to the preclusive effect of the prior litigation and as to the arguments for summary judgment, and presented evidence establishing a prima facie case and controverting each of the defendant's claims.

The District Court ruled in favor of the movant on both res judicata and summary judgment. Since res judicata alone would have sufficed to dismiss the action if it could have been properly supported by the facts and the law, it is not unreasonable to infer that the district court ruled on both because in the final analysis there is not a clear basis for dismissal in either branch of defendant's motion (nor, perforce, in both together). Indeed, the procedural records evidence that defendant itself apparently had doubts: In response to the plaintiffs' Answer to the Motion, the defendant-movant submitted a Reply covering the res judicata argument only, and also without

motion practice or stipulation by the plaintiffs replaced the original motion with a Modified Motion asking for dismissal on res judicata alone; but later defendants asked the court for leave to submit yet another Reply to the Answer, this time including the summary judgment part[2].

In any event, plaintiffs contend that in order for the district court to reach a position of granting either branch of the motion for dismissal, the arguments and evidence offered by the non-movant were improperly discounted relative to those of the movant, and ambiguities with regard to both the law and the facts were resolved inappropriately in favor of the movant[3].

The Course Of Proceedings

These lengthy proceedings commenced when the complaint was filed, and summons and Notice issued pursuant to 28 U.S.C. 636 (c) on September 22, 1989 (Docket #1). In the first of many instances wherein the defendant employer, IBM, received extensions of statutory or scheduled time, the time to answer was extended to December 20, 1989, and the actual answer was made a day later (Docket #3).

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[2] The district court denied a request by IBM to file a moving memorandum of twenty-five pages instead of ten (Docket #44), but they still managed to submit no less than four memoranda totalling forty-one pages in the course of this proceeding: "IBM's Memorandum in Support of its Motion for Summary Judgment," 10 pages, dated 9/30/92; "IBM's Reply Memorandum in Support of its Motion to Dismiss," 10 pages, dated 3/5/93; "IBM's Memorandum in Support of its Motion for Summary Judgment," 6 pages, dated 3/5/93; "IBM's Reply Memorandum in Support of its Motion for Summary Judgment," 15 pages, dated 6/3/93. Even though they did not have that much of significance to talk about, this did give them the well acknowledged "persuasive rhetoric" benefit of repetition.

[3] This is especially evident in areas of express ambiguity, where, for instance -- to give an example that occurs early in the Memorandum Order -- the court states (MO p2), "The extent to which these [complained of workplace] episodes were directly related to, the result of, or independent of her physical condition is unclear." There are also many instances of factual errors and internal contradictions in the Memorandum Order, most of which redound to the disadvantage of the plaintiff. Many of these are noted in the appropriate context in the later parts of this brief; others, which were listed as part of a Notice of Motion brought before the district court on August 26, 1994 (Docket # 106), are reproduced in the appendix to this brief.

On March 22, 1990, Anne Golden, Esq., a solo practitioner who had recently left the law firm of Donald L. Sapir, where she had worked on this case, was substituted as attorney for plaintiffs (Docket #5); and the following day a scheduling order was issued which set Discovery cutoff for September 5, 1990 (Docket #6).

On August 1, 1990, defendant IBM noticed depositions of five physicians who had treated plaintiff Dr. Misek-Falkoff as far back as 1982, and the actual depositions began two months later. (All of these personal physicians stated under oath that they did not see her as disabled from work.) Discovery of plaintiff's medical history then continued with depositions of her neurosurgeon and others, and production of hospital records, over about a year and a half.

A confidentiality order insisted upon by IBM before they would produce any discovery matter was entered on October 16, 1990 (Docket #13), and it was only subsequent to that time that plaintiffs were granted any discovery of IBM records. Starting thereafter, documents were produced by IBM in varying quantities at different times over the next two years, and depositions of current and former IBM employees were initiated. The first such deposition took place on February 22, 1991, and others continued over the next 14 months.

On April 18, 1991, Donald L. Sapir was restored as counsel for plaintiffs, and Judge Gerard L. Goettel recused himself because his son was then employed by the Sapir firm, having started there during the interval when Ms. Golden was plaintiffs' attorney (Docket #18); and on April 30, 1991, the case was reassigned to Judge Vincent L. Broderick (Docket #20).

On January 7, 1992, the case was referred to Magistrate Judge Mark Fox for supervision of all pre-trial matters, including settlement discussions[4] and discovery issues. (Docket #33).

On May 4, 1992, defendant IBM was given leave to file a motion for summary judgment by June 12, 1992 (Docket #42), which date was later extended to September 30, 1992 (Docket #55).

In the course of pre-trial discovery, Magistrate Judge Fox had occasion to formally rule in favor of the defendant on two controversial questions, regarding attorney-client privilege and confidentiality of certain medical records. Plaintiffs appealed his

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[4] The one such discussion held was actually supervised by Mr. Givens, a law clerk. See below.

decision to District Court Judge Broderick, who reversed the first ruling and modified the second in a published Order on October 1, 1992, Misek-Falkoff v. International Business Machines, 144 FRD 48 (SDNY 1992).

IBM's motion papers were filed on September 30, 1992 (Docket #s 56 57 58), and plaintiffs' answer was filed on November 5, 1992 (Docket #s 60 61 62).

On November 24, 1992, a conference was convened in Chambers by Law Clerk Givens, regarding possible terms of settlement and other matters. It came to light at a conference held before Judge Broderick on May 11, 1993, that there were several follow-up ex parte telephone conversations between Mr. Givens and defendant's attorneys, in the course of which defendant's attorneys took exception to certain views expressed by Mr. Givens, finally asserting concerns about his impartiality, whereupon Mr. Givens immediately recused himself from the case (Docket #81, Minutes of conference May 11, 1993, p6).

On March 5, 1993, IBM filed a modified Notice of Motion, two Memoranda, and a Reply (Docket #s 63-66). These papers were one hundred days late, the Reply having been due on November 25, 1992.

Apparently Mr. Givens' earlier recusal did not satisfy IBM or its attorneys for long, and they renewed their complaints six months later, at the May 11th conference, citing statements they attributed to Mr. Givens, such as "that he found certain unspecified business events and litigation events troublesom[e]" (Minutes of conference May 11, 1993, p4), and "that the fact that compulsory retirement can be used to get rid of someone on medical grounds was horrifying to him" (id p5). They then expressed concern about the "ability of the court for whatever reasons to be impartial," and pressed Judge Broderick to recuse himself, which he declined to do. (id., p15)

Also as a result of that conference, an Order issued on May 13, 1993, gave the defendant leave to file a new Reply, with an expanded memorandum, and affirmed plaintiffs' right to a sur-reply (Docket #67).

On June 18, 1993, plaintiffs' attorney Sapir brought a motion to withdraw as counsel on account of a fee dispute, and asked for a charging lien, and a retaining lien against the plaintiffs' files. Judge

Broderick decided, on August 25, 1993, against the retaining lien[5], and referred the matter to Magistrate Judge Fox to resolve and make recommendations which would enable the court to "reach a complete adjudication" of the claims, (Misek-Falkoff v International Business Machines Corporation, 829 F.Supp. 660 (SDNY 1993)). The first paragraph of this Memorandum Order reads as follows: "This suit, initiated in 1989, alleges handicap discrimination by an employer under the Rehabilitation Act 29 USC §§ 701 et seq., and is possibly subject to the Americans With Disabilities Act, 42 USC §§12101 et seq."

In a Memorandum Order dated May 13, 1994, the district court granted IBM's motion to dismiss, finding the federal claim barred by res judicata, and granting summary judgment under the Rehabilitation Act (Docket #100)[6]. A judgment was signed on May 16, 1994 (Docket #102).

Plaintiffs appeal on both branches of this judgment.

Statement Of Facts Relevant To The Issues Presented For Review

In 1985 plaintiff-appellant Dr. Linda Misek-Falkoff was then in her ninth year as an employee of the Research Division of the International Business Machines Corporation (IBM). Before being invited to IBM she had a career in academia, during which she taught and did pioneering research in the application of computers to discourse analysis in literary and medical contexts. In 1972 she received the Ph.D. degree at Case Western Reserve University, where she was also an instructor and lecturer in the departments of English and of Computers and Information Sciences. She then joined the faculty at Vassar College as an assistant professor of Computer Science Studies, and in 1977 she was recruited from that position to be a Visiting Scientist (Special Research Associate, Laboratory Automation) at the IBM Research Center in Yorktown Heights, New York.

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[5] The delay in turning over the files materially slowed down the plaintiffs' replacement attorney in his preparations for litigating the Keller case.

[6] No substantive proceedings were held by Magistrate Judge Fox before the dismissal of the case in chief, and Judge Broderick dismissed Mr. Sapir's motion without prejudice at the same time. (Docket # 101)

For some years before coming to IBM, and during most of the time she was actively employed there, Dr. Misek-Falkoff was subject to severe recurring face and head pains for which there was no definitive diagnosis, although such was diligently pursued. These agonizing pains sometimes also affected her facial expression, and both the pain and physical manifestations could on occasion be disabling and cause her to be absent from the workplace. But, as contemporaneously witnessed and attested by co-plaintiff, she usually made up lost work time voluntarily after hours or on weekends (Motion, sealed Ex H), and during this period she was extremely productive as a teacher, researcher, programmer and system analyst, receiving very good performance evaluations (Answer Ex 23, 22, 20). She wrote widely-used practical computer systems, designed and administered innovative educational and computer training programs, developed an automated typesetting system for books, published numerous technical papers, and actively participated in professional conferences, herself conceiving and co-chairing in 1982 an international conference on software quality measurement, a subject area that has since become of great importance to the computing industry (Sur-reply Ex MF-11).

In early 1984 Dr. Misek-Falkoff was promoted to "staff systems analyst," a general job category spanning a very large set of particular assignments with varying degrees of required activities ranging from close interaction with the marketplace to intensive personal technical research (Answer Ex 1). One of her early particular assignments was to have "overall responsibility for the Office Systems Education program at the T. J. Watson Center." (Answer Ex 5) This category-initiating assignment was sometimes properly referred to as "Lead Office Educator."[7]

Also in 1984 Dr. Misek-Falkoff began to develop an active interest in applications of computers in the practice of Law, as a natural evolution of her earlier work in discourse analysis, and in January 1985, in conjunction with her IBM work and management approval, she applied for admission to the evening program of the Pace University Law School. As she wrote in her application, she hoped "to

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[7] The district court took issue with the plaintiff's use of the term "lead office educator" as differing from the employer's description of her job as simply "office educator." (Order p 4 Fn 5) It is clear from the exhibits cited here that it is the defendant employer who has misrepresented the situation.

combine my doctoral interest in verbal evidence, my computer work in text analysis and information retrieval, and the real world of practical exigencies comprising the practice of law" in such a way as to "remain an employee of IBM, and to find a place within that Company to combine my interests to my own benefit and that of my employer." ("Rationale for my applying to Pace University Law School," Sur-reply Ex MF-2)

In 1985, two watershed events occurred in the life and career of Dr. Misek-Falkoff.

First[8], on May 29th, another employee, one Neal Keller, a recent hire (3 months) with managerial aspirations and pretensions of being a psychologist (though not so credentialed), refused to continue a planned business meeting in which he was supposed to provide a demonstration and instruction on a standard personal computer application to Dr. Misek-Falkoff and another employee, one Elizabeth McCarthy. The record (deposition and trial testimony) shows that he was not fully prepared for the meeting and he tried to cover his embarrassment by verbally challenging them to an argument. When Dr. Misek-Falkoff said that she really wanted to get on with the business of the meeting, he taunted her with insults and statements to the effect that "as a psychologist" he knew her feelings better than she herself, and asked her to leave his office, which she did (Sur-reply Ex WW-23). The subject matter of the meeting, and even more, good working relationships, were important to Dr. Misek-Falkoff, and after twice returning to his office to try to get the meeting back on course, she expressed her frustration by bringing her hand down on a table[9] where a looseleaf notebook was resting open. Keller then picked up the notebook and left his office. That afternoon he reported several

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[8] The district court refers to what follows here in these terms: "An incident triggering events leading to this lawsuit occurred on May 29, 1985." (MO p6) And in a footnote attached to this statement, disclaims fault finding: "I make no findings as to who was at fault in this and any other incident set forth in this memorandum." (MO p6 Fn9) Accepting this at its face value, the incident itself can be removed from consideration as to the propensity of the plaintiff for "outbursts," an issue to which the district court attached decisive importance, and one to be discussed later in this brief. However, it remains necessary to deal with what was actually "triggered," to wit, a sequence of events violative of the plaintiff's civil rights.

[9] See below: The court errs in stating (Order p 6) that the table was next to Mr. Keller (not of record).

versions of what had transpired to multiple managers, and not getting immediate satisfaction from them he later that night wrote a memorandum (id.) in which he falsely accused her of trying to hit him over the head with the notebook, and threatened IBM with legal action over this alleged criminal assault. In the memorandum, sent on IBM's computer network the next morning, he wrote (Sur-reply Ex WW23) (underlines added):

> "I was assaulted physically on IBM property by an IBM employee."

And listed among the things he had "decided to do:"

> 1) Follow up to be sure that Linda gets the psychiatric counseling I feel she desperately needs. I need to know how IBM deals with these situations. As the person who was assaulted and who has to teach knowing Linda is still in the building I need some assurances that Linda is in ongoing therapy. This is not a matter of choice as far as I am concerned.
>
> 2) Press assault charges unless #1 above or some equally significant intervention strategy is implemented.
>
> . . .
>
> 4) Find out how we train all IBM managers to recognize and address personal stress in employees. I recognize that we have many gifted individuals at Research and that it is a rather unique and open environment but I sense that we (Research) were aware of problems and could have intervened before the crisis occurred.

He ended the letter with a self-protective flourish, suggestive of his psychological pretensions:

> "I would be willing to share this memo with Linda but felt at this time it might just add to the stress she is experiencing."

With evident malice, Keller sent this self-aggrandizing, defamatory, and extortionate letter to numerous people on IBM's computer network without any notice of confidentiality or sensitivity, where its further propogation could never be fully controlled, tracked, or retracted.

At the time (1985), various management people told Dr. Misek-Falkoff of the existence of the letter, told her different versions of the accusations it contained, and told her it could portend trouble -- and indeed very dire consequences -- in her employment, but she was not permitted to read the letter herself or hear actual quotes from it, and

no one told her that it contained threats of legal action by Keller against IBM. (Motion, sealed Ex P)

Keller maintained pressure on management, and on June 17th, after having had no further contact whatsoever with Dr. Misek-Falkoff since May 29th[10], he demanded that she be barred from attending a seminar he was giving in the auditorium. It fell to Ann Gruhn, Dr. Misek-Falkoff's manager, to go to her office at the last moment and ask her not to attend the seminar, even though Ms. Gruhn had earlier advised her to attend and had the understanding that she could. Under the circumstances, Ms. Gruhn was uncomfortable with the situation, and when Dr. Misek-Falkoff started to call the personnel department for clarification, as she had been instructed to do by the Medical Department, Gruhn attempted to take the phone away.[11]

IBM management's illicit campaign to discredit and dishonor Dr. Misek-Falkoff, using her handicapping medical problems as a central feature, started shortly afterward when Allan Weis, her departmental Director, who was in charge of the operation of the computer network, recognized the potential embarrassment that might result from Keller's misuse of the computer network (Sur-Reply Ex MF-2, Weis deposition 2/22/91, p 75)[12] and from manager Gruhn's improper impetuous reaction.

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[10] She was, in fact, out of the workplace most of that time, suffering from a then improperly diagnosed physical ailment which unhappily turned out to be the early stage of a miscarriage. (Medical Chart, 200395 200386) See NOTE below.

NOTE: The IBM Medical Chart for Dr. Misek-Falkoff was included as an appendix to the Kaminer Affidavit submitted by IBM in their original Motion. The pages are marked with production numbers from 200291 to 200614, but are otherwise not indexed. It will be cited in this brief in the form used immediately above.

[11] Keller had by now succeeded in creating enough of an uproar that the lines of authority to Dr. Misek-Falkoff had been become confusing; personnel officers, medical staff, and line management were all in the picture. When she asked the medical staff to help clarify matters that very morning, she was told to call the personnel department in case of need, and that is what she was doing when Ms. Gruhn tried to take the phone away (Motion Ex T). Ms. Gruhn admits reaching across Dr. Misek-Falkoff's desk for the phone after she started to make a call. (Motion Ex U)

[12] The potential embarrassment over poor network management was both corporate and personal, as Mr. Weis was even then being groomed to head a

The second watershed event was that through the coordinated efforts of her local physicians Dr. Misek-Falkoff was put in contact with one Dr. Peter Jannetta, a pioneering neurosurgeon at the Presbytarian Hospital in Pittsburgh, who finally diagnosed her prolonged and painful medical condition as "atypical trigeminal neuralgia," and performed delicate and dangerous brain-stem surgery to relieve the condition on August 1, 1985[13]. It has turned out that the operation substantially mitigated the condition, although the recuperative period was difficult. For a long time after the surgery she had considerable pain from the healing skull incision and sometimes wore a "TENS" wired-unit to electrically control the level of pain; she used a cane to help maintain her balance while walking, and she suffered from blurred speech and other post-operative problems. All these symptoms gradually diminished, and by the fall of 1986 she was reaping the benefits of the surgery, with substantially reduced pain from the neuralgia, and, as IBM admits, correspondingly fewer absences from the workplace (Motion Ex M)[14]. See also Sur-reply Exhibit 4, affidavits of Ross, Sayegh, Kelly.

Before her return from the surgery in mid-October, 1985, IBM management had already decided to exploit her medical condition and handicaps to put her out of the workplace. They concealed this plan from her, but when she returned to work and by invitation wrote to Dr. Ralph Gomory, Director of Research and IBM Executive Vice-

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company, Advanced Network Services (to be financed by IBM and others), to take over management and control of NSFNET, a major component of INTERNET. In this position, Mr. Weis is a public figure, and his management methods and principles have on occasion been criticized in the media.

[13] Although the district court took notice of the fact that the plaintiff had surgery "to alleviate the disorder" in 1985, two years before her severance from active employment (Order p 2), it nevertheless overlooks the fact that this was a turning point (toward a better life) that substantially mitigated the symptoms of her atypical trigeminal neuralgia and, significantly, incorrectly describes plaintiff's condition as obtaining, without differentiation, during the "last seven years of her employment" (Order p 4).

[14] The second secret application for MDIP (Motion Ex M) lists the employee's absence rate for 1984, 1985, and 1986 as 17.6, 43.0 and 16.7 percent respectively. Disregarding the absolute figures, which can be shown to be inflated, it is apparent that after the bump in absence rate in 1985 due primarily to the very serious brain stem surgery, her absence rate dropped below that of 1984.

president, about unfinished aspects of the incident with Keller, he insisted that she take part in an "Open Door" investigation. According to IBM Motion Ex Y), such an investigation is supposed to be objective, and the investigator is supposed to "view the situation from the perspective of the individual . . . ." In this case it turned out to be more like a kangaroo court. The report of the "Open Door" investigator[15] predictably whitewashed prior management actions and concluded that Keller's description of the events of May 29, 1985 was correct, without ever looking for evidence beyond the statement of an "eyewitness" who was legally blind in one eye (a critical factor of depth perception in this situation) and had been coached by a copy of the defamatory electronic mail -- thus paving the way to discharge Dr. Misek-Falkoff or secretly apply for total and permanent disability status for her, by claiming she had a propensity for violence. Meanwhile, IBM's managers and executives continued to deny her requests to access and respond to the accusatory letter, while using it for their own purposes, and they refused her requests to bring her together with Mr. Keller under management aegis with a view towards conciliation, so that the matter could be put behind them by both parties. IBM's managers finally encouraged her to bring a civil suit against Mr. Keller, thus cementing in a polarization between them, and as it turned out, also between the plaintiff-appellants and IBM, who without warning provided their own lawyers for Keller and ultimately declared themselves in privity with him.

Thus, IBM management, which had decided on a campaign to discredit Dr. Misek-Falkoff[16] as the most convenient way for them to solve the problems engendered by Mr. Keller's malevolence -- an irretrievable defamatory and threatening letter loose on their computer network and management indiscretions committed as sequelae to the Keller incident -- took advantage of the obvious medical handicaps of

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15 The district court erred in saying the investigation was done "for" the employer, it was in fact done "by" the employer.

16 See, for example, Motion Exhibit X, a memorandum apparently solicited by director Weis and written by manager Chandra on August 21, 1985. The employee had been away attending to her surgery for some four weeks, and the matters discussed in the memorandum had taken place three or four months before. Also, SUr-reply Exhibit AF-30, pages from deposition of Personnel Director Canavan, with reference to management pressure to terminate the employee.

the recuperative period when she returned to work following the surgery, and instead of celebrating the success of the procedure and welcoming back a productive employee who could now be expected to be an even stronger contributor to the IBM business, they began to isolate her and cut back her job, to set the stage for placing her on MDIP.

The activities engaged in by her direct management in collusion with members of the Medical and Personnel Departments[17] was such that their intentions could not be clearly discerned by the employee. However, she was moved on occasion to make inquiries about her status, and these were always answered with dissembling reassurances; in particular, she was encouraged to take more time before returning to the workplace in case of a medical absence. During this period, management actions such as a merit increase in pay and good peformance appraisals on the one hand, and cutbacks in her job and restrictions on her communications on the other, gave intermittent reinforcement to the thought that her employment status either was or was not in question -- conditions certain to confuse and worry anyone with or without handicaps, and certain to adversely affect work performance both directly, by deprivation of proper workplace facilities and tools, and indirectly, by its effect on the employee's health and morale. Nevertheless the record shows that Dr. Misek-Falkoff performed her job satisfactorily in spite of this adverse treatment.

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[17] The Medical Chart notes far more conferences with management and Personnel than interactions with the employee in the period from August 1985 onwards, and has large sections of "privileged matter redacted" in November and December of 1985.

ARGUMENT RE RES JUDICATA

Under The Applicable Statutes And Precedents Of New York State Law The Instant Action Is Not Precluded By Any Other Legal Action Involving The Plaintiff-appellants

Plaintiff-appellants appeal the lower court's dismissal of the federal claim in this action as barred by res judicata, which the court based on the state court action, Misek-Falkoff and Falkoff v. International Business Machines Corporation and Allan H. Weis, Index No. 7720/88, New York Supreme Court, Westchester County (1988, Gurahian, J.) (the Weis case) and the application of New York Law. The question is whether the application to the facts in this case was properly carried out.

Plaintiff-appellants assert that the court erred in the application of New York's "pragmatic transactional analysis" principle by failing to examine facts in context (totality of circumstances), and by failing to apply all the criteria for distinguishing the gravamina of the two cases, since such examination would have shown them to be different, and that therefore claim preclusion and res judicata could not apply; that the two cases were largely concurrent, and had they in fact been brought in the same court at the same time on the different claims of intentional infliction of emotional distress and of violation of the Rehabilitation Act, each claim would perforce have survived or fallen independently because of the different gravamina; that the claims which "could have been brought" were indeed brought in separate contemporaneous actions, as permitted under New York law; and that in any case, the dismissal of the Weis case was not "on the merits," so claim preclusion could not apply for that reason. Furthermore, the lower court erred in not considering the evidence that the decision in Weis was tainted by deliberate deception on a material issue, which should have been a threshhold question in considering whether to give it prospective weight.

Finally, we raise here the consideration that the defendant could have brought on a motion for dismissal on the basis of the res judicata defense with identical facts and arguments at least two years earlier than they did, and they should not now be allowed to sweep into the waste basket the factual evidence and judicial rulings that were

obtained at great cost while preclusion was statically lurking in the background.

The matter of res judicata deserves a very high level of review inasmuch as it is a drastic remedy which carries with it the danger that a litigant will be unfairly deprived of a day in court.

New York's principle of "pragmatic transactional analysis" when properly applied in the instant situation leads to the conclusion that res judicata is not appropriate because the gravamina of the two complaints are different.

The district court's reliance on Smith v. Russel Sage College, 54 NY2d 185, 445 NYS2d 68, 71,429 NE2d 746 (1981) is misplaced. The Memorandum Order quotes extensively from that case, especially where it quotes from Matter of Reilly v. Reid, 45 NY2d 24, 407 NYS2d 645, 648, 379 NE2d 172 (1978). The court notes similarities in some of the factual allegations in the complaints of the Weis case and the instant case, and fails to look further than that part of the cited authorities which can support preclusion on the basis of such superficial similarities. Thus, the Memorandum Order improperly takes for granted the predicate that the two cases must be grounded on the same gravamen and states as follows (Order p 17):

> A cause of action which cannot be revived once dismissed "may denote one of several separately stated claims in a pleading based on the same congeries of facts but related to different legal theories of recovery. A 'cause of action' may also denote a separately stated claim on the same congeries of facts, but for different legal relief. But even if there are variations in the facts alleged, or different relief is sought, the separately stated 'causes of action' may nevertheless be grounded on the same gravamen of the wrong upon which the actions is brought." Smith, 445 N.Y.S.2d at 71, quoting Matter of Reilly v. Reid, 45 N.Y.2d 24, 407 N.Y.S.2d 645, 648, 379 N.E.2d 172 (1978). [Underline added.]

In following this course of predetermination and not considering the "may not" side, the court simply rides over the real difficulty in determining whether the gravamina are the same, a point on which Reilly has a good deal to say:

> It is blackletter law that a valid final judgment bars future actions between the same parties on the "same cause of action" (see, e.g., 50 CJS, Judgments, § 598). The difficulty arises in determining when a second action involves the same cause of action as an earlier one (Perry v Dickerson, 85 NY 345, 348). Many definitional verbalizations have been attempted, none with complete success. For instance, in Secor v Sturgis (16 NY 548, 558) it was said that "[the] true distinction between demands or rights of action which are single [**175] and entire, and those which are several and distinct is, that the [*28] former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts."

In the present instance, rights of action are "several and distinct," since the claims in the Weis case arise out of the overt acts of the defendants, and the claims in the instant federal case arise from their covert acts. That the overt acts may have been in the service of the covert acts, or arisen from them is immaterial.

Reilly further emphasizes this point of the difficulty of determining what is the same cause of action, and its central importance to properly implementing the policy bases for res judicata:

> The nub of the problem is that the policy bases for res judicata, in the sense of claim preclusion, do not permit easy definition of the "same cause of action", a term which, as will be seen, is not one of single meaning in the practice.

Significantly, later in the opinion Reilly gives a relatively objective criterion for determining when a second action may not be barred:

> It is true that even when two successive actions arise out of the identical course of dealing, the second may not be barred, it has been said, if "[the] requisite elements of proof and hence the evidence necessary to sustain recovery vary materially" (Smith v Kirkpatrick, 305 NY 66, 72, supra).

To apply this criterion to the instant case, we can find the requisite elements of the proof spelled out by the lower court (Order p 23):

> To establish a prima facie case under Section 504 of the Act, 29 USC 794, plaintiff must show that at the time of placement on permanent disability she was (1) handicapped within the meaning of the Act, (2) "otherwise qualified" to perform the essential functions of her given position, (3) placed on inactive status solely by reason of her handicaps,

and (4) that the employer was a recipient of federal financial assistance.

It is painfully obvious that not a single one of these requirements for proving violation of the Rehabilitation Act is a requirement for proving intentional infliction of emotional distress; and conversely, the requirement for proof of the latter -- that the acts complained of outrage the sensibilities of reasonable members of society -- is not required to prove a violation of the Rehabilitation Act.

Proper application of transactional analysis, as above, shows conclusively that the transactions in the two cases cannot be the same because the claims in Weis arose from transactions between the plaintiff and members of IBM's management, while the matters complained of in the case at bar arose from transactions among the members of management themselves (see O'Brien v City of Syracuse).

The plaintiff-appellants exercised their due process right to choose the appropriate forums for different actions, and to pursue them separately and concurrently, and should not be penalized for so doing

The Weis case, with a cause of action of intentional infliction of emotional distress, was brought on May 13, 1988. One month before, on April 14, 1988, plaintiff-appellants retained an attorney specializing in employment matters to evaluate the justness of bringing an action for discrimination on the basis of disability. On or about June 8, 1988, said attorney wrote to IBM to inquire about federal funding, as a preliminary to a possible action under federal law[18]. Thus, although the instant case was not filed until later, plaintiff-appellants were committed to the federal action for

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[18] Although the actual timing may be irrelevant in light of other considerations which militate against res judicata, this point is noted here because the Memorandum Order gratuitously calls into question the good faith of the plaintiff-appellants by the here unjustified remark that "To permit plaintiff to proceed with this action would defeat the purposes of claim preclusion. It would permit a disappointed litigant to resort to federal court to trump the state judicial system where the litigant chose to bring the initial litigation and fully exercised the opportunity to litigate the case." (Order p 19) It is clear from the chronology that there could have been no thought of "trumping" the state courts.

discrimination and IBM had notice of their intention long before April 29, 1989, when the state motion court ruled on the Weis case.

The complaint in the instant case was first filed on July 10, 1989, naming IBM and several executives as defendants, but because plaintiffs could only estimate the true cast of characters it was withdrawn and refiled on attorney advice naming only IBM on September 22, 1989 (Order p 13, Fn25). Thus, there was at least 8 months before the Appellate Division confirmed the dismissal of the Weis case, and 12 months to the "final" disposition by the New York Court of Appeals, during which the two cases ran concurrently. As can be seen by examination of the docket, throughout this period of concurrency, and before, IBM made no effort to merge or combine the cases for court economy, convenience of parties, logical considerations, or other reasons.

Plaintiffs' right to separate actions is spelled out by the New York Court of Appeals in the Matter of Reilly v. Reid, as noted above, a case cited in Smith v. Russell Sage College, which in turn is actively relied upon by the defendant and the lower court:

> These strong policy bases [i.e., judicial economy and the need at some point to end litigation], however, if applied too rigidly, could work considerable injustice. In properly seeking to deny a litigant two "days in court", courts must be careful not to deprive him of one (cf. Commissioners of State Ins. Fund v Low, 3 NY2d 590, 595). Thus, claim preclusion is tempered by recognition that two or more different and distinct claims or causes of action may often arise out of a course of dealing between the same parties, even though it is not, except in refined legal analysis, easy to say that a different gravamen is factually involved (see, e.g., Smith v Kirkpatrick, 305 NY 66). A party's choice to litigate two such claims or causes of action separately does not bar his assertion of the second claim or cause of action (see Secor v Sturgis, 16 NY 548, 554, supra). [Underlines added].

Hence, the point that "[n]ot only could plaintiff here have raised all of her claims in state court; she also had the choice of proceeding initially in federal court," (MO p19) is improperly applied here to the issue of res judicata because two different and distinct causes of action did arise out a course of dealing between the same parties.

The Weis case, was not "fully litigated," independent of the fact that its gravamen differed from the instant case

__In a landmark case overturning earlier standards, the New York Court of Appeals gave a list of nine criteria to be applied in deciding whether a party has had one's day in court:

> A comprehensive list of the various factors which should enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation. (Schwartz v Public Administrator, 24 NY2d 65, 298 NYS2d 955, 246 NE2d 725 (1969)) [Underlines added]

__The forum of the Weis case was the same New York Supreme Court which had earlier dismissed by summary judgment Dr. Misek-Falkoff's defamation case against Keller, only to have the dismissal overruled and the case remanded by the Appellate Division[19]. The ruling of the Appellate Division was not yet available at the time that the Weis case was filed, and IBM's attorneys, who were also Keller's (courtesy of IBM), maneuvered to have the same judge (Gurahian) assigned in both cases.

__The extent of the litigation was pitifully slight. The state motion court[20] decided the Weis case on the papers only. There was no discovery, and therefore the factual issues could not be and were not fully litigated. This was reflected in the decision of the Appellate Division which stated, in part:

> Absent concrete factual allegations of a continuing conspiracy or concerted course of action against plaintiff, we need not

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[19] The Appellate Division found genuine issues of triable fact and the need to test defendant's affiant.

[20] It is possible that the district court was unduly influenced by defendant-respondent's repeated reference to a phantom "trial court" in talking about the Weis case. In fact, the case was disposed of on the papers in the Individual Assignment (Pre-trial) Part of the New York Supreme Court in Westchester County, and never came close to the Trial Assignment Part, much less to a trial.

reach the issue of whether, if properly pleaded, the acts more remote in time could be considered actionable as part of a "continuing" tort.

There could be no more consideration without discovery; but discovery in the instant case did adduce substantial evidence of "concerted action against plaintiff," which must be examined here as to whether it was (and is) in violation of the statutes[21]. Inasmuch as no judicial time or effort was expended on these matters heretofore, the principle of judicial economy would not be compromised by such examination.

There was no opportunity to find new evidence between the filing of the Weis case and the filing of the instant case. In the minds and intent of the plaintiffs these were contemporaneous actions, there was no discovery whatsoever in Weis, and, of course, IBM did not volunteer any information.

There was some indication of a compromise verdict, precisely in a direction to forestall preclusion and leave open the possibility of later actions. The motion court chose to dismiss on the basis of CPLR 3211(a)(5) and (7), rather than on CPLR 3212, summary judgement (see below), and the Appellate court left open the possibility of further litigation if concrete facts were ever to come to light (see above).

There are stark differences in the applicable law, as shown above; e.g., the necessary proofs are completely disjoint.

The Weis case was not decided "on the merits" so as to be preclusive, in any event

The case of Smith v. Russell Sage is cited by defendant as a precedent for bar on action in the federal court because in that case (and others cited) procedural dismissal was treated as if on the merits. In Smith, however, and as pointed out by Siegel in his New York Practice, and the CPLR, that treatment was contemporaneous; conversion of 3211 dismissals to 3212 merits decisions must in New York State be by explicit conversion, by motion of defendant or if sua sponte documented expressly in the Order or Decision, else all dismissals on technical grounds could belatedly and wishfully be treated as on the merits and 3212 need not exist in the law.

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[21] An earlier opinion in the instant case is suggestive on this point (144 FRD 48 (SDNY 1992) Fn 1), raising the question of possible planning for a future wrong.

In their Notice of Motion in the Weis case, the defendants therein moved for:

> . . . an order pursuant to C.P.L.R. 3211(a)(5) and (7), or alternatively, for summary judgment pursuant to C.P.L.R. 3212, . . .[Underline supplied]

IBM's Reply Memorandum of 3/5/93 states without foundation that they asked for:

> . . . both a motion to dismiss pursuant to §3211(a)(5) (statute of limitations) and (7) (failure to state a cause of action) and a motion for summary judgment pursuant to CPLR §3212. [Underline in original]

It is not clear why the defendant introduces this discrepancy, but either way the possibility of a §3212 judgment was before the motion court, and it chose to grant only the §3211 dismissal, not on the merits. The decision (Motion Ex A) is unequivocal on this point:

> Defendants move to dismiss on the grounds, inter alia, that the timely allegations of the complaint fail to state a cause of action (CPLR 3211[a][5] and [7]). (Exhibit p 1)
>
> . . .
>
> In view of this court's finding on the grounds of CPLR 3211[a][5] and [7], dismissing the complaint . . .. (Exhibit p 5)

Nowhere in the decision is §3212 mentioned, and the requisite explicit contemporary conversion to "on the merits" is absent.

The decision in the Weis case was tainted by false representations and therefore it should not have prospective weight.

The district court erred in failing to address the evidentiary materials offered by the plaintiffs showing that the defendant IBM deliberately misled the Weis court on the material issue of the nature of the placement of plaintiff Dr. Misek-Falkoff on MDIP, thereby irrevocably tainting the decision. At this time we cannot know how the motion court would have ruled[22], -- or, if it had ruled the same way,

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22 The district court is mistaken in supposing, as stated in its footnote 29, that plaintiffs applied to the state court for relief from the dismissal of the Weis case (also mischaracterized there as an "employment action"). They did ask the state court to reconsider, in the light of the discovered fraud, an Order of April 1, 1988, in the Keller case, and grant the plaintiffs' previous application to file a Second

how the Appellate Division would have ruled -- had the courts known that the placement on MDIP was permanent, with no prospect of plaintiff ever being restored to active employment at IBM, as was adduced by discovery in this federal action. The decision of the Weis court that placement on MDIP was not sufficiently egregious to shock the conscience of the community was necessarily (and erringly) based squarely on sworn averments of IBM's attorney (Affidavit of Eugene Souther, sworn to September 14, 1988, in support of defendant's motion to dismiss or for summary judgment in the Weis case):

> . . . placing Misek-Falkoff on the company's Medical Disability Income Plan ("MDIP") "does not amount to either termination of employment or from preclusion of return to active employment at full salary" (Sur-reply Ex WW-26, affidavit of E. Souther)

The truth of the matter, necessarily known to the defendant and its attorneys, but not to the court or the plaintiffs, is that IBM in secret fact regarded the MDIP as a form of permanent temination. The key is given in the letter approving the MDIP application in which this paragraph appears (Answer Ex 16):

A medical review is not requested. [Underline added]

Since a medical review is required in order for a person to return to active employment, the significance of this paragraph, as we learned only recently, is that they will never have a chance for return. That this was the intent in the case of the plaintiff is confirmed by the deposition testimony of the then Manager of Personnel for the IBM Research Division (Answer Ex 3, Sur-reply Ex 15):

> Q. Did the panel state whether or not the benefits that were granted were mandatory or voluntary?
>
> A. Mandatory.
>
> Q. The panel said that?
>
> A. Yes.
>
> Q. Was the request for mandatory benefits made by Dr. Kaminer?

Amended Complaint and restore the first and second causes of action, the only two of twelve causes of action which the Appellate Division had not restored upon remand. Had they asked for relief in Weis, the basis in newly discovered fraud would have been essentially the same, but here it would have concerned the whole case rather than a relatively small part of it as in Keller, and it is impossible to predict what the outcome would have been.

A. Yes.

Q. And had you and Dr. Kaminer discussed whether or not the request would be mandatory or voluntary?

A. I believe we discussed it.

Q. And can you tell me what you recall about that discussion?

A. I know we discussed it and believed it would be mandatory. We would request mandatory MDIP.

Q. Were you in favor of mandatory benefits?

A. Yes, I was.

Q. What was the reason or reasons that you were in favor of mandatory benefits?

A. The reason I was in favor of mandatory benefits was that I felt it was inappropriate for Dr. Misek-Falkoff to come back into the IBM work environment.

Q. Did you think it was inappropriate for Dr. Misek-Falkoff to have a choice in deciding whether to accept or reject the benefits?

A. I didn't believe she should have a choice; no.

Q. And was the reason you didn't believe she should have a choice because you felt that she should not be permitted back in the work place?

A. Yes, that's what I said.

Q. Did you feel that Dr. Misek-Falkoff should ever be permitted back into the work place?

A. I did not feel she should ever be permitted back in the work place. [Underlines added]

It is clear from the foregoing that IBM did indeed mislead the Weis court on a material matter, that this deception was before the district court, which erred in not addressing the estoppel effect such fraud should have on preclusion, in particular nulling prospective applications of a judgment without necessarily overturning the judgment itself in the light of Federal Rule 60(b) or NY CPLR 5015.

Thus, even if Weis had been decided on the merits, or so converted by motion, which it was not, affirmative relief in the form of res judicata on the matter decided (an equitable remedy requiring clean hands) should not be available for a defendant who has surreptitiously

withheld highly material information from the plaintiff and the courts.[23]

Because of the history of this case, the same principles of judicial economy and the need at some point to end litigation, which underlie New York law on res judicata, perforce rule out the use of the res judicata defense at this time in this action

With regard to the application of New York law on res judicata to the facts of this case, the argument above provides a sufficient basis to warrant a finding for the plaintiff-appellants if the district court were to have viewed it in the light most favorable to the non-movant. The fact that it did not take this view is clearly an error. Moreover, there is still another compelling reason for reversal, having to do with the timing of the motion for dismissal.

The argument advanced by IBM for res judicata is based entirely on the similarity between certain subsections of the two complaints, and this similarity was known to the defendant from the start. The so-called final adjudication of the Weis case took place on September 18, 1990, when the NY Court of Appeals denied leave to appeal. Defendant-respondent's motion for dismissal on the grounds of res judicata, brought on September 30, 1992, and again in a modified motion on March 5, 1993, depends on nothing that transpired after September 1990, and depends on no facts not known then. If judicial economy and putting an end to litigation were its justification, it should have been brought sooner rather than later, and could have been brought with the same effect at any time after September 1990.

Since then, the district court has published two opinions, and the litigants have been burdened with 6000 produced documents and 23 depositions, tremendous expenses in money and time, not to say emotional costs in dealing with some of the more odious aspects of IBM's illicit covert actions learned about in the course of two years of discovery.

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[23] If the Weis decision was not obtained by fraud (i.e., Dr. Misek-Falkoff is really not precluded from return to the workplace), then since the plaintiff is still an employee of IBM, albeit an "inactive" one, it must be asked if the fact that the employer has taken no action to determine if she should be reinstated is currently and continuingly an instance of adverse discrimination and a violation of the Rehabilitation Act.

If the district court's erroneous ruling for res judicata is affirmed it will cement in judicial waste, rather than advance judicial economy, and while it may bring an end to the litigation, it will have done it after exacting huge costs which, according to this (erroneous) ruling, were really unnecessary. To put it differently, if it were proper to end this litigation by res judicata, it should have been done before the costs were incurred and so much time was lost.

> The defense of res judicata can be waived if it is not raised in a proper and timely manner, and if the defendant in the second action behaves in a manner inconsistent with a claim of res judicata.[24] (Weinstein Korn and Miller, New York Civil Practice, vol 5, p 50-123 (1994))

It is now too late to invoke this affirmative defense with any equity. Therefore, the res judicata ruling should be reversed in the interest of justice (FRCP Rule 1), and in accord with the application of the very same underlying principles of jurisprudence that govern its use under New York Law.

ARGUMENT RE SUMMARY JUDGMENT

Plaintiff-appellants appeal the granting of summary judgment as being unsupported by the facts and the law[25].

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[24] Two years of discovery proceedings, including highly intrusive depositions of the plaintiff's private physicians insisted upon by the defendant, is certainly inconsistent with a claim of res judicata. IBM's notice of a Modified Motion (in lieu of a Reply) on March 5, 1993, in which they dropped the request for summary judgment, restricting themselves to res judicata, strongly suggests that they may have been aware of the impropriety of their course of action and the consequent waiver of the res judicata defense. The length and complexity of the events as recorded in the docket speaks also to the untimeliness of defendant's res judicata motion

[25] The material here is fact intensive, but subject to selection and interpretation. The law, as given for example, in Overton v Reilly 977 F.2d 1190 (7th Cir. 1992), which summary judgment granted at the district level was reversed because "Overton has presented evidence sufficient to create a genuine question whether he was qualified for his position," the court wrote of its own duty thus:

> We review a grant of summary judgment de novo, and must take the facts in the light most favorable to the non-movant.

Plaintiff-appellants raised genuine issues of material fact relating to precisely those issues on which the lower court found for the defendant, and made the requisite prima facie case to defeat the motion for summary judgement. The factual evidence shows: that Dr. Misek-Falkoff was "otherwise qualified" for her job as shown by formal evaluations and other incontrovertible evidence; that the prominent role of medical records and testimony of IBM's managers and medical department lead to the obvious incontrovertible conclusion that the adverse treatment of Dr. Misek-Falkoff was "solely on the basis of her handicap" as a matter of law; that IBM acted purposefully and in violation of the Rehabilitation Act in secretly planning to remove her from the workplace; that pending the maturation of their plan, IBM not only did not accommodate the plaintiff's handicaps or perceived handicaps, but actually disaccommodated -- moving her to a workplace site that did not have a medical facility, segregating her from her departmental coworkers (but not at all from other employees), and virtually cutting off her access to the tools (appropriate computers and printers) necessary for her assigned task; and that IBM violated the Rehabilitation Act and their own rules and procedures when they placed the plaintiff on Medical Disability without offering her the standard option of resigning.

The facial cause of action in this case subsumes and does not highlight gender or age discrimination, because discrimination against the handicapped of any age or gender is deplorable. But that these are subtexts echoes throughout the opinion. There is still a tendency to

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This appeals court, in Teahan v. Metro-North 951 F.2d 511 (2nd Cir 1991) also reversed and remanded a finding of summary judgment, in the course of which it cogently stated the aims of the Rehabilitation Act and the consequent obligations on the employer and the courts:

> For an employer to assume that simply because of a handicap an individual is unable to function in a given employment context stereotypes that person, seeing him, as it were, through a glass, darkly. To view a handicapped person in such a simplistic way effects the discrimination forbidden by § 504. At the same time nothing in the statute prevents an employer from making a decision based on the job-related attributes of a person's handicap. It is the close interplay of these two notions, that is, between a handicap and its attributes, that we must analyze and resolve on this appeal.

regard women and men differently in the workplace, even among well-meaning people. One such bias is the idea that paid work or a professional career is not as important to a woman as to a man, and therefore her right to a place in the work force is not as strong. This perhaps unconscious bias may influence decisions both in, and about, the workplace. But women's professions are now accepted as being as important in our society as men's, and issues surrounding women's professions are clearly deserving of more than a cursory glance. Hence, a high level of review should be applied to the matter of summary judgment herein.

A Prima Facie Case Has Been Made, And Genuine Issues For Trial Have Been Adduced, When Ambiguities Are Resolved And Reasonable Inferences Appropriately Drawn In Favor Of The Non-moving Party

In ruling on summary judgment, the District Court stated the requirements on the plaintiffs to be as follows:

> To establish a prima facie case under Section 504 of the Act, 29 USC 794, plaintiff must show that at the time of placement on permanent disability she was (1) handicapped within the meaning of the Act, (2) "otherwise qualified" to perform the essential functions of her given position, (3) placed on inactive status solely by reason of her handicaps, and (4) that the employer was a recipient of federal financial assistance.

The District Court assumed (1), that plaintiff was handicapped "for purposes of ruling on this motion" (Order pp 23,24), and noted that the defendant does not challenge (4), that the employer received federal financial assistance (Order p23 Fn 33). The court did not independently address (3), whether IBM's actions were solely by reason of plaintiff's handicaps, but concentrated on (2), the question of "otherwise qualified."

(1) At all times before and at the time of her processing onto permanent disability status, and currently, plaintiff Dr. Misek-Falkoff was and is handicapped within the meaning of the Rehabilitation Act

The Rehabilitation Act, as quoted in the Memorandum Order, defines a "handicapped" person as one "who (i) has a physical or mental impairment that substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 USC 706(7)(11). Defendant perforce conceded that Dr. Misek-Falkoff was handicapped within the meaning of the Act by placing her on the Medical Disability Income Plan (MDIP) for which the eligibility requirement is described thus in "About Your Company," the IBM employee handbook:

> An employee will be considered medically disabled by giving satisfactory proof[26] to IBM that a disability from any cause prevents the taking of any employment for pay or profit. (Motion, Ex LL)

Work qualifies as a major life activity, as aptly observed by the District Court (Order p23), so anyone properly placed on this plan is at least regarded as having an impairment that limits the major life activity of work, and is therefore handicapped within the meaning of the Rehabilitation Act.

Similarly, an employee "on whose behalf" management applies for medical disability benefits is at least perceived as having such an impairment and is therefore necessarily handicapped under the Rehabilitation Act (unless, of course, management is dissembling and the application is being made fraudulently, which would be a violation per se of §504). As admitted by the defendant (Motion, Kaminer Aff, ¶4):

> The MDIP process is initiated by or through the employee's management when the employee's absences, behavior or performance demonstrate that the employee is unable to sustain consistent job performance as a result of his or her medical conditions. (underline added)

Such a process with respect to the plaintiff was secretly initiated on January 21, 1986 (Motion Ex EE), and again on April 8, 1987 (Motion Ex M), from which it is necessary to conclude that the

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26 The record before the court shows that Dr. Misek-Falkoff did not apply for placement on MDIP, did not know that she was being considered for it, and therefore, of course, did not provide any "proof". As amply documented throughout the papers in this case, all the MDIP processing was conducted in secret. (See, e.g., Answer, Aff of plaintiff, ¶¶4,25,26.)

plaintiff was regarded as handicapped by her managers and other IBM officials at least as early as January 1986, and at least as late as June and July 1987, when the April 1987 application was approved and acted upon. It is reasonable to assume that she was regarded as handicapped in between as well, and also -- since she is still an employee (inactive) and has not been restored to active status -- that she is still so regarded.

Thus, the plaintiff was handicapped within the meaning of the Rehabilitation Act at all times relevant to this action, and the District Court's assumption that she was handicapped "[f]or purposes of ruling on this motion" is reasonable.

(2) Plaintiff was otherwise qualified for her job at all times of her processing onto permanent disability, (and at all other times during her active employment as well)

As a prelude to considering the question of whether the employtee was "otherwise qualified" for her job, the District Court stated its version of the issues in the following prejudicial formulation (Order p 22):

> Does prohibited discrimination arise where a handicapped employee, qualified to perform the technical functions of her job but unable to get along with coworkers and management or to perform effectively in a timely manner, is placed on mandatory inactive status? (Order p 22). (Underline of conjectural part added)

This is a heavily loaded "question," and it will be shown that in order to justify the predicate (which carries an implication of "not otherwise qualified") the court necessarily erred in its assessment of the evidence before it, including the nature of plaintiff's job at the time in question.

The District Court went on to give its analysis in the following terms, harking back to conditions as they may have been in early or mid-1985 (Order p 25) (underline added):

> Whether or not plaintiff was "otherwise qualified" to perform the essential functions of the job turns on the significance of absences and interpersonal relations, factors the employer cites as the basis for decline in plaintiff's ability to perform, and as the reasons for her ultimate removal from active

employment, in light of the employer's official job description for a staff systems analyst and office educator.

But in late 1985 and continuing until the placement on forced disability status in mid-1987, plaintiff's job was severely narrowed to the point where her assigned tasks did not match the description of her former staff systems analyst job, and she was no longer an office educator[27]. Consequently the significance of absences and interpersonal relations was much less, and the District Court necessarily errs in accepting as a standard the employer's false depiction of the requirements at the time in question. Countervailing facts were before the Court, in the form of performance plan job descriptions (compare Answer Ex 21, Performance Plan of 1/28/86[28], and Answer Ex 20, Performance Plan of 1/11/84[29]), item

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[27] The change in assignment was punitive, and not by reason of any failure in performance, which was more than satisfactory in every aspect of her job. See footnotes below.

[28] The principle assignment after 1985 reads thus:

> Install TEX on Yorktown VM systems. Ensure that the installation is complete and verify that TEX works.
> Determine what printers are supported and what fonts and in what sizes are available for which printers.
> Understand and document existing procedures to use TEX.

Compare this with the last previous assignment described in the following footnote.

[29] The principle assignment prior to mid-1985 reads thus:

> Linda's main assignment is to establish a program to ensure that our users take advantage of the tools we have provided to improve productivity in the office. Her responsibilities include the following:
> * establish education programs to reach users who don't come to the RePEP sessions and who are using obsolete methods (e.g. executive secretaries, managers)
> * develop user documentation and teaching aids
> * investigate alternative approaches to self-education (e.g. combination of slides and taped monologues, videotape, online interactive sessions, learning center)
> * provide a program for new user education designed especially for secretaries, and asist in administering the program as needed.

14(e) of Plaintiff's Amended 3(g) Statement, Dr. Misek-Falkoff's sworn statement (Answer, Aff. ¶25), and Mr. Falkoff's sworn statement (Sur-reply, Aff. p7 ¶10[30]).

Indeed, the lower court noted that the employee's job was changed: "Plaintiff claims that the employer . . . removed her from her position as a computer analyst and office educator" (Order, p2); ". . . she was later moved to another facility, and her job assignment was modified." (Order p7); and a quotation, "'[He] [i.e., her manager] made more cuts in her job at that point.'"

Nonetheless, defendant begs the question of the job requirements at the time of the MDIP by talking about the job requirements of the staff systems analyst and office educator assignments, without saying that they obtained pre-1986, and not at the relevant time (Answer, Weis Aff ¶16; Garley Aff ¶11 et seq). Defendant also introduces into the record some pages from Dr. Misek-Falkoff's deposition testimony about her work when she was working as a staff systems analyst and

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> Evaluation criteria include the quality of the program Linda defines, her ability to manage its implementation, and the completeness and effectiveness of documents she writes and presentations she puts together.

It is noteworthy that the execution of this assignment, the last as a staff systems analyst and office educator, and one indeed requiring sensitive interaction with others and timely results, was rated "CONSISTENTLY EXCEEDED the requirements of the job IN ALL KEY AREAS." (Emphaisis in original)

[30] Sur-reply, Falkoff Aff., p7, clearly affirms that plaintiff's job was different, and points out where defendant's affidavit's deliberately confuse the chronology and are in error:

> . . . Weis (in ¶16) and Garley in ¶¶11-15, talk about Dr. Misek-Falkoff's job responsibilities in 1984-1985, as if they were the same in 1986-1987. She was still rated a Staff Systems Analyst until her MDIP termination, but there is ample testimony which need not be repeated here that her job, once she returned from brain-stem surgery and was being held in disfavor on account of the Keller defamation, was reduced to that of a programmer (not a dishonorable profession by any means, but not Dr. Misek-Falkoff's forte) with minimal requirements to personally interact with people. In fact, her management chose to isolate her from her group and steadily reduce her contacts both within the Research Division and outside it, so that she would not be missed by many people when they eventually let the axe fall.

office educator, that is, when she was designing systems and software[31]. Thus, the Court errs in accepting the defendant's description of the requirements of the employee's job in the period addressed by this action, and also when citing the "plaintiff's own definition of her duties at deposition" (Order p26) as the basis for judging whether she was "otherwise qualified" at the relevant time.

The formal written appraisals of the plaintiff's performance, conducted by the employer as a normal business practice, unequivocally show that she more than satisfied the requirements of her jobs (Answer, Ex 20 21 22 23; Order p5 Fn7). These appraisals were made by seasoned managers "trained in the evaluation process," and were monitored for quality by the Personnel Department (Answer Ex 6, Bergren deposition pp285 286). The written evaluations are intended by IBM to be definitive about all aspects of performance:

> The purpose of the Performance Planning, Counseling and Evaluation Program is to let employees know what is expected of them, how they are doing, and how they may improve their performance. It also provides a means of evaluating an individual's overall performance as a primary consideration for salary purposes. (Answer Ex 7, pages from IBM Manager's Manual[32])) (Underlines added)

An overall level of performance necessarily takes into account the effect of absence from the workplace, and the fact that attendance may be independently considered a "condition of employment" is orthogonal to this.

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31 The deposition extract (Reply, Ex J) starts at a point that tends to obscure the fact that the plaintiff's description of her work relates to a type of assignment she no longer had after 1985. Nevertheless, if one recognizes that she was not expected to plan "conceptual systems" or "design software" in her final assignment, the true nature of the questioning is revealed (underline added):

> A. . . . I was part of the initial planning of these systems, meaning the conceptual system.
>
> Q. I will ask you in a few minutes about some examples of the software that you helped design, but at the moment I am just asking the physical steps, the functional steps of what you did to design software.

32 Also see Answer Ex 26, page from "About Your Company," handbook for employees.

As the district court says, "[w]hat is most significant, however, is not absences as such, but whether or not the job is completed in a timely manner in light of the work involved." (Order p 26) This being the case, a level of absence that slows the completion of a job will perforce have an effect on the measured performance, and conversely, a satisfactory or better performance evaluation implies that absence was not excessive in a practical sense.

Similarly, if good skills in interpersonal relations are a functional requirement for a job, as they were for the plaintiff when she was working as a staff systems analyst and office educator, then a satisfactory appraisal (in this case a "2": "CONSISTENTLY EXCEEDED the requirements of the job IN ALL KEY AREAS." (Answer Ex 20, Performance evaluation of 9/11/84)) implies that the interpersonal relations were good.

Plaintiff's appraisal on December 1, 1986, the last before she was placed on MDIP, was reviewed and approved by Allan H. Weis, an executive level manager. She was rated "3": "Results achieved consistently met the requirements of the job and exceeded the requirements in many areas." (Answer Ex 21) It follows that her absences were not excessive and her interpersonal relations were at least adequate for the job, and she was therefore "otherwise qualified" for her job at that time, the same job she had at the time of her placement on MDIP.

Nevertheless, despite the court's analysis that "[w]hether or not plaintiff was 'otherwise qualified' to perform the essential functions of the job turns on the significance of absences and interpersonal relations," (supra) and the official performance evaluations indicating that these factors did not interfere with good performance, the lower court erroneously found that the plaintiff was not "otherwise qualified."

The actual finding of the District Court is obliquely stated as the premise of the question quoted above, namely that the plaintiff was "unable to get along with coworkers and management or to perform effectively in a timely manner." This finding is not supported by the referenced record when ambiguities are resolved in favor of the non-movant as they should be. At the very least, plaintiff-appellants provided substantial evidence showing that in these matters there were genuine issues for trial.

The evidence most relied on by the district court is self-servingly contrived by defendant employer-management to exploit the employee's handicaps for their own purposes

__To arrive at its questionable conclusions, the court relies chiefly on four of defendant-respondent's (sealed) exhibits, but the provenance of these uniformly self-serving documents raises serious questions about the reliability of their contents, and to the extent that they would be admissible as evidence -- if at all -- it would be a matter for a jury to decide how much weight to give them, and to what purpose. As is shown below, one document (Motion Ex I) does not reach to the time period this action pertains to, and comprises secret notations elsewhee contradicted; another (Motion Ex O) is a report, written more than three months after the last date it concerns, in which the covering memorandum, quoted by the court, contradicts its own internal conclusions; another (Motion Ex P) is the report of a kangaroo-court like investigation (nominally, an "Open Door") forced upon the plaintiff immediately after her return from brain stem neurosurgery; and the fourth (Motion Ex G) is a completely contrived effort at managerial post-justification and cover up, comprising hearsay and solicited gossip.

Re Defendant's Motion Exhibit P, "Canavan Open Door Report." Plaintiff's managers decided in the summer of 1985 that they wanted to remove her from the workplace. (Sur-reply EX AF30, portion of Canavan deposition) As early as October 11, 1985, before Dr. Misek-Falkoff returned to work following brain-stem surgery, preparations were being made to oust her via medical disability (Sur-reply Ex WW12). As shown in the exhibit, Jack Canavan, Personnel Director of the Research Division, was critically involved in that activity.

When the Director of Research and IBM Executive Vice-president Ralph Gomory decided to force an "Open Door" investigation of concerns expressed by the plaintiff at his invitation (although she told him that she did not want such an investigation and was not physically up to it)[33], he appointed Mr. Canavan as the investigator despite the

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[33] See Motion Exhibit E, ¶34: "Dr. Gomory inquired about Dr. Falkoff, and suggested plaintiff might use the "open door" grievance procedure to resolve her concerns over her treatment from May 29, 1985 to the time of her surgery. But Dr.

fact that IBM's Open Door Policy states in part as follows (Motion Ex Y) (Underline added.):

> If the recipient of an Open Door appeal does not investigate the issue personally, it should be assigned to an individual who is in a recognized and responsible position organizationally removed from the employee's immediate management, and who is free of prior involvement in the circumstances of the particular case or individual appeal.

A reasonable juror might easily conclude that Mr. Canavan's prior commitment to support plaintiff's management in their preparations and plans for her ouster disqualified him as the open door investigator in this situation, that his appointment violated IBM's own policy aimed at assuring fair play, and that consequently his conclusions, set forth in Motion Exhibit P and extensively relied on by the District Court (Order p7,8 FN 13), could not be trusted[34].

Falkoff, still very weak from her surgery, wrote to Dr. Gomory that she was not physically strong enough to do so, and that it would not be her choice."

[34] Apart from the dubious nature of the report comprising Motion Ex P, the District Court, in its references to it, has drawn inferences harmful to the plaintiff not justified by the record. Thus, there are the following discrepancies between the court's findings (Order p7) and the record:

> Order: "Plaintiff's managers determined that plaintiff should be handled 'from a medical standpoint.' This approach was developed as a result of two personnel investigations, . . ."
>
> Record: The first investigation contemporaneously decided the opposite, to proceed administratively, but three months later, when the plan was made to separate the plaintiff by subverting the MDIP, a cover note was written stating the opposite (see below re Motion Exhibit O.) The statement is directly controverted by the employee's manager, who wrote on August 21, 1985: "Based upon the assessment of I.B.M. medical staff regarding Linda's physical and mental condition, my recommendation is to treat her as any other employee. Both Dr. Keller, and Dr. Robbins have examined her. . . . Both doctors stated that they found nothing to indicate that Linda had any mental problems, and that we should treat her as any other employee." (Motion Ex X 303474)

> Order: ". . . the second of which was an internal administrative employee appeals process initiated at plaintiff's request to address various of her concerns."

Record: The plaintiff specifically asked not to be involved in such as appeals process, see Note above

Order: "After an extensive investigation, an investigative report prepared for the employer concluded that the computer trainer's account with respect to the first 1985 incident was accurate."

Record: According to the report, the investigation of this incident was not at all "extensive," but absolutely minimal. The report states (p 11) (Underline added.): "The investigation found that the letter written by Neal Keller was factually accurate. This is based on comments by Neal and Betty McCarthy (eye witness)." Significantly, Ms. McCarthy had "no use of left eye," as recorded in investigator Canavan's notes (Sur-reply Ex MF7, IBM document #100283); and she was obviously coached about the incident by the selfsame defamatory letter which was sent to her, as well as to others (Sur-reply Ex WW23). Further revelatory of Mr. Canavan's predetermination of his conclusions is the fact that there is no record of an attempt to find other witnesses to an event that took place at an open office, on a busy corridor, in the middle of the work day. It is no wonder that the Appellate Division remanded the Keller case with the instruction to test the credibility of all concerned (Sur-reply Ex MF-7).

Order: "The report also concluded that with respect to the second incident plaintiff's prior manager had treated her appropriately . . ."

Record: The report actually came to no conclusion about the "second incident," which took place on June 17, 1985, stating (id) "The stories as told by both Dr. Falkoff and Ms. Gruhn relative to the 5/17 [sic] incident, were completely different." The report said nothing about appropriate treatment by the manager.

Order: ". . . and that plaintiff had been told of the exact accusations which had been made against her by several employees."

Record: The sole employee to make an accusation against the plaintiff was Neal Keller. (This is a particularly unfortunate misreading of the record.)

Order: "The investigative report did, however, criticize both her prior manager and a medical department physician for inconsistent treatment of plaintiff."

Record: The report did not so criticize the manager, but it did reveal its bias by criticizing Dr. Judith Keller, the IBM managing physician, for stating her opinion about the May 29, 1985 incident: "When I was first informed of the incident and from my knowledge of [Dr. Falkoff], I didn't think it was part of [her] character to do something like this" (Motion Ex P, p10).

Re Defendant's Motion Exhibit O, "Pollard Memorandum to File." This belated memorandum on the subject of the May 29, 1985 incident is self contradictory on the important question of whether the employee should be "handled 'from a medical standpoint.'" (Order p7). Thus, the memorandum proper, dated September 26, 1985, states:

> "As a result of my review with the parties involved, I've concluded that the incident of May 29th should be handled from a medical standpoint and not in an administrative manner."

But the final entry in the attached chronology, dated June 21, 1985, contradicts this (Underline added.):

. Meeting with Judy Keller and Alex
. Confirmed Linda not dangerous, but does need lots of support
. Okay to change managers

- Give specific responsibility
- Hold accountable for performance

. Alex will be manager

-No need to change office
-Tell "best fit"
-PC training - use other support; not Neal

A reasonable juror may well look upon a document that is self-contradictory on a key issue as being less than reliable on other issues as well, and reasonably conclude that the switch from the administrative approach, where the plaintiff would have the opportunity to be measured on her actual performance, to a "medical standpoint," where all decisions are made in secret and the employee is denied such opportunity based upon a stereotypical reaction to a perceived handicap, was and continues to be a major violation of the Rehabilitation Act.

Re Defendant's Motion Exhibit I, "Gruhn Handwritten Notes for 1982-1983." This exhibit comprises notes secretly kept by one of plaintiff's managers during a period of time well before that involved in the case at bar, from November 1981 to March 1984. They are in the nature of covert diary entries, and clearly represent only one

personal point of view regarding whatever is written about. For example, the writer criticizes her own explosiveness and personality traits, and does not include anything regarding the positive communications between her and the plaintiff. To the extent that these notes describe problems in working with the plaintiff, they are nullified by official documents such as positive performance evaluations and promotion recommendations by the same manager during the same period.

Re Defendant's Motion Exhibit G, "May 20, 1987 Chandra Memorandum to Weis." Exhibit G, and Exhibit H, of which it is part (production numbers for H are 303592 to 303598, and G continues with 303599 to 303601; 303594 refers to G) were openly and admittedly prepared for the purpose of influencing the MDIP panel. This is indicated by the last sentence of Exhibit G (303601), and is confirmed by the timing: the formal application to mandate permanent disability for the plaintiff was made on April 10, 1987 (see Medical Chart, 200526[35]), Exhibit G is dated May 20, 1987, and the panel met and ruled on the application on June 11, 1987 (Medical Chart, 200525). It is replete with factual errors, hearsay, and the writer's speculations about the working of the employee's mind.

Two of the factual errors, controverted by other evidence before the district court include:

> That "business plans[36]" "to announce TeX to our user community in December 1986" were delayed by the plaintiff's absences until May 1987; controverted by the manager's own

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35 The IBM Medical Chart for Dr. Misek-Falkoff was included as an appendix to the Kaminer Affidavit submitted by IBM in their original Motion. The pages are marked with production numbers from 200291 to 200614, but are otherwise not indexed.

36 The district court erroneously interpreted this as referring to external marketing plans for an IBM product, stating: "A memorandum from plaintiff's manager-- not controverted by plaintiff--states that plaintiff's absences contributed to a five-month delay in introducing to the market a product on which plaintiff was working." (Order, p 11) In actuality, and (of record, see submitted Performance Plan/Appraisal) no IBM product plans were involved; TeX was a competitive product being imported for internal use by a specialized internal user community. These facts are before the court in plaintiffs' Sur-reply, Exhibit MF-11, which, like the Performance Evaluation noted above, also controverts the contention that availability was delayed.

> entry on the Performance Evaluation he administered on December 1, 1986 (Answer, Ex 21) which shows that as much of the system as could work on the existing hardware was already serving the users, to wit, "Linda completed TeX release 1 installation at Yorktown & TeX output can be produced on Tektronics 618, IBM4250, and APA6670 printers."
>
> That plaintiff had stored materials in "another room," they were being moved in July 1985, and some materials were "inadvertently" dumped in the trash; again controverted by the writer himself in Motion Exhibit AA, and in the Answer, Misek-Falkoff Affidavit, ¶15. The date given in Exhibit G is wrong, it should have been January 1986; and as a result the one event becomes two in other papers, such as the moving affidavit of Weis.

The tone of the document is obviously biased. For example, it lists as an "incident" a report that the plaintiff "was going to declare herself physically handicapped." And uses innuendo: "For reasons still not clear to me . . ."

These are factors which could reasonably lead a jury to disbelieve the allegations made in Exhibits G and H, assuming that they are admissible at all, given their dependence on multiple levels of hearsay and the ulterior motive for their production. There can be no question for a reasonable juror that the plaintiff's management was under compulsion to exaggerate handicaps in order to discredit her one way or another, once they took Keller's side in the defamation action and provided him with their own attorneys[37]. IBM's interest in that suit was explicitly stated to the Keller court by attorney Garley (Sur-reply Ex AF31):

> IBM believes this lawsuit is also an indictment of IBM's management's handling and investigation of the matter. Thus, IBM's decision to provide Mr. Keller a defense in this action was motivated by its interest in supporting its management . . .

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[37] Clearly, purposely exacerbating known or perceived handicaps in concert with other goals does not vitiate the handicap discrimination.

The preponderance of the evidence is that Dr. Misek-Falkoff got along very well with coworkers and well enough with her managers.

___Exhibit 11 of plaintiffs' Sur-reply contains numerous documents attesting to Dr. Misek-Falkoff's ability to work with people. These range in date from 1979 to 1992, and include, for example, letters of appreciation from the IBM Research Center Manager of Security, the Director of IBM's Systems Research Institute, Research Staff Members, IBM marketing people, authors, a judge of Family Court, the Westchester County Medical Center (for Volunteer work), and others. And plaintiff could have presented many congratulatory letters from co-employees had she not been locked off the computers on which electronic mail routinely travelled in the community

The allegation that she was unable to get along with coworkers in the workplace is in point of fact specifically controverted by manager Ann Gruhn, who wrote as follows in an official memorandum recommending a promotion on January 10, 1984 (Answer Ex 5):

> In her current assignment YOFFICE she has demonstrated the ability to organize a large body of knowledge into a cohesive system, and to present that system in a way that is appealing to a diverse user community. She has worked well with others and required little management involvement in the project. [Underline added]

The allegation that she was unable to get along with coworkers is further controverted, as is the allegation that the plaintiff could not get along with her managers, in a memorandum written by Gruhn in February 1985, in which she expressed pride in the secretarial training program designed and partially administered by Dr. Misek-Falkoff (Sur-reply Ex 11):

> The Office Text Systems group in the Computing Systems Department has established a program to train secretaries in the use of the computing systems for office work.
>
> . . .
>
> Dr. Linda Misek-Falkoff is responsible for designing the programs and conducting the initial survey-meetings. She will be contacting you to arrange a convenient time to meet.
> I am excited by this program.

Clearly, Manager Gruhn had no hesitation in having Dr. Misek-Falkoff represent her group to other employees of the IBM Research Center.

It is the common sense of the community that there can often be personal differences or tension between managers and employees, and what counts is the answer to the question "Do they work well together in getting the job done?" That the plaintiff got along well enough with her managers is attested to by the good performance appraisals that she consistently earned, from her earliest days in IBM up until she was placed on permanent inactive status in July 1987. These good Performance Appraisals are official business documents and cannot be brushed aside and discounted in retrospect simply because the employer now conclusorily says he wants to. Even granting that there can be variations in numerical ratings, every performance appraisal has substantive goals which either were or were not accomplished to a greater or lesser degree; the appraisal documents this, management actions such as pay increases and promotions were contemporaneously effected on the basis of it, and history should not be rewritten to conform to present prohibited stereotyping.

The cited uncontroverted facts do not demonstrate that the plaintiff was not "otherwise qualified" as a matter of law

The Order cites several alleged "admissions" by the plaintiff as possibly conclusive that she was not "otherwise qualified" for her job (Order p 28). However, each one presents a genuine issue of material fact as to whether plaintiff's statements can be properly interpreted in such a way as to render the plaintiff disqualified.

Thus, plaintiff might even concede that when she was verbally taunted by Mr. Keller in front of a valued friend and coworker she had partially trained, she was frustrated and humiliated and brought her hand down on a table[38] upon which there happened to be a book (the table was not, as the lower court opinion states, near Keller). The court concedes in the opinion that this was a reaction (p6 Fn 11), and therefore not an "aggressive act" as it later (p 28) characterizes it. A reasonable juror could decide that such a reaction under the

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38 This was later documented by the female coworker who was present as a gesture to "emphasize a point."

circumstances did not render plaintiff disqualified for her job; and in any event nothing like it recurred, even though the plaintiff worked at IBM, in a covertly hostile environment, for over two years after the incident.

Plaintiff also might even concede that her trust in management was shaken when she learned that IBM was providing their lawyers for Keller and supporting a counterclaim against her, when she had actually been following the advice of the Personnel Director in bringing the defamation lawsuit. A reasonable juror could decide that such reservations about management were provoked or justified under the circumstances, including the evidence that management was planning to sever her from the workplace for nearly two years before they actually did it in a way that was discriminatory and harmful.

Plaintiff also might even concede that she was sometimes absent from the workplace for extended periods of time, due to medical problems, especially the brain-stem surgery in 1985; but all her absences were legitimate, as conceded by the defendant, and well within the limits of IBM's Sickness and Accident plan. A reasonable juror might decide that such absence was not disqulaifying for plaintiff's job, in the light of her good performance appraisals and her attested work habits of voluntarily making up for lost time. Such a juror might reasonably decide that using such absence as a disqualifier was discriminatory under the Rehabilitation Act because it disparately affects handicapped persons, who are more likely to use this supposedly universal benefit.

It is not clear from the Order where the other "admissions" are to be found in the record, and so they cannot be addressed here. If the defendant can point them out in their response the plaintiffs may be able to address them in their reply.

<u>The uncontroverted facts do show that the employer acted with discriminatory animus to the severe detriment of the employee</u>

___In finding no "discriminatory intent" in these notes of the MDIP Panel meeting of February 1986 (Order, p29; Answer, EX 13):

> "Had no problem with case. 'Someone not unsat [unsatisfactory] today--can you force her out of business.' Yes. MDIP."

the district court overlooked the that which can be found therein, to wit, that she was a satisfactory performer as of that date, and someone wanted to remove her from the workplace anyhow, using her medical handicap as an excuse, and therefore focusing on it.

The court below erred in favoring the movant in its analysis and interpretation of the actions of the employer regarding a first attempt to place the plaintiff on permanent medical disability. The court's inference that the "company's decisionmakers" deserve credit for rejecting the suggestion that an ERISA-controlled benefit should be subverted is surely leaning over backwards to give credit where none is due. But even more, the "company's decisionmakers" deserve censure for suggesting the illegal action. They brought the matter before the MDIP Panel, which was improper discriminatory per se, because as admitted by the defendant (Kaminer, Motion Affidavit 9/25/92, ¶4):

> The MDIP process is initiated by or through the employee's management when the employee's absences, behavior or performance demonstrate that the employee is unable to sustain consistent job performance as a result of his or her medical conditions. (underline added)

Whereas, at that time, the employee's most recent performance evaluation was a "2", meaning that she more than met the performance requirements of her job (Answer Ex 20):

> Results achieved CONSISTENTLY EXCEEDED the requirements of the job IN ALL KEY AREAS. (Emphasis in the original)

Thus, the mere fact that the question -- "Someone not unsat [unsatisfactory] today--can you force her out of business." -- could be asked at the Panel meeting, showing that the employee's absences, behavior, and performance were such that she actually sustained consistent satisfactory job performance, implies a deliberate violation of the predicate for bringing the matter before the MDIP Panel in the first place, and therefore is strongly indicative of a discriminatory animus[39] on the part of the plaintiff's management, the "company's

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[39] See Doe v. Region 13 Mental Health-Mental Retard. Com'n, 704 F.2d 1402, (5th Cir.1983) at 1412: "where there has been no showing of discriminatory animus . . . no violation of section 504 could reasonably be found." In the case at bar the opposite is true: there is more than enough evidence of discriminatory animus and disparate impact in the actions of the employer, as here shown in one instance, to indicate violation of §504.

decisionmakers." It may be arguable that the notation itself is not persuasuive of discriminatory intent, but there is no doubt that the fact that it could be asked in that context is the result of an intentional discriminatory action.

The defendant admits that the second application for permanent disability was discriminatory: In a memorandum from the Personnel Manager to the former Division Director of Personnel with copy to the then current Director of Personnel, she states that the employee's "ailments are not ones that normally would be covered by the [MDIP] program." (Answer Ex 19)

The pages of the second secret application for MDIP, dated April 8, 1987, are marked: "PREPARED FOR IBM ATTORNEY". (Sur-reply Ex 28; Motion Ex M.) Why would this be? At deposition, the personnel manager under whose supervision the application was prepared admitted that this was not a standard marking ("not done without thought") and was done so that ". . . IBM would be able to control whether or not the document was produced to Dr. Misek-Falkoff in a pretrial discovery stage of the lawsuit in which the document was relevant." (Sur-reply Ex WW17, Deposition p148). This surely reveals a discriminatory animus, which, even if, arguendo, not directed primarily at the employee's handicap, was nevertheless not possible to exercise absent a handicap or the perception of a handicap.

The signature page of this MDIP application has separate places for the IBM Location Physician and the Area/Divisional Medical Director. In another discriminatory divergence from standard procedure, Dr. Kaminer, the Area Medical Director, signed in both places, excluding the location physician, Dr. Judith Keller (no relation to Neal Keller), who knew the plaintiff's medical history best of all the IBM medical staff, and officially supported plaintiff's innocence in re aforementioned incident, from experience and felt knowledge of Dr. Misek-Falkoff's character (see Medical Chart).

(3) Plaintiff has been and is being adversely discriminated against through placement on permanent disability, solely on the basis of her handicap

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In Teahan v. Metro-North Commuter R. Co., 951 F.2d 511, 513 (2d Cir 1991), 113 S Ct 54, 121 L.Ed.2d 24 (1992), this court stated (at 516):

> The "solely by reason of" inquiry is designed to weed out § 504 claims where an employer can point to conduct or circumstances that are causally unrelated to the plaintiff's handicap.[40]

And further on the same page:

> A plaintiff is entitled to challenge as pretextual an assertion that the employer is not relying on the employee's handicap. But when the employer does not disclaim reliance on the handicap, the "solely by reason of" element is by definition satisfied.[41]

Plaintiff's handicap was her medical condition, as recognized by the District Court (Order pp23,24):

> Plaintiff's position is that her handicap was limited to her neurological disorder and that she was discriminated against on that basis. For purposes of ruling on this motion, I assume that plaintiff was handicapped.

Having made this assumption, it was incumbent on the District Court to find, by resolving ambiguities in the proffered evidence in favor of the non-movant, that the plaintiff was placed on permanent disability[42] solely by reason of her handicap.

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[40] In IBM's moving memorandum (p 7) they quote this passage to support their position -- with the word "related" substituted for "unrelated."

[41] See also, Pushkin v University of Colorado, 658 F.2d 1372 (10th Cir. 1991)

[42] It is ludicrous that IBM claims (Motion, Weis Aff ¶15(p); Kaminer Aff ¶17; 3(g) Statement ¶14) such placement as an accommodation ("the ultimate accommodation" (Motion, Garley Aff ¶11)) under the Rehabilitation Act, which has as a primary purpose the integration of handicapped persons into society. The fallacy of thinking that a small amount of money could compensate for the loss of a professional career and society of others was set before the lower court (Sur-reply, Falkoff Aff ¶2). The deliberate deceptions that accompanied the placement -- not advising the plaintiff of its permanence, and not giving her the option of refusing it -- are dealt with elsewhere in this brief. Both the fact of the deceptions and their nature evince a discriminatory animus, and should have been so recognized by the lower court.

Thus, while the employer harps on the plaintiff's alleged "excessive" absences, "unbusinesslike" conduct, and "inability" to perform her job, as the reasons for placing her on MDIP, these ultimately unsupportable derogations are always accompanied by the employer's averment that they were due to her medical condition. The letter of July 6, 1987 from IBM to the plaintiff, confirming her placement on MDIP, for example, recites the canards but ascribes them to the medical condition that is the basis for this action (Motion Ex DD):

> The plan [MDIP] provides for payments to employees who, due to medical reasons, are unable to perform the requirements of the job. We have placed you on this plan in light of your medical history after careful consideration of your high absence record, your periodic disruptive, unbusiness-like conduct at work and your inability to perform the requirements of your position consistently. (Underline supplied)

The employer states that the plaintiff could have been fired for cause in 1985 (Motion, Weis Aff ¶11, 12):

> 11. By late 1985, Dr. Chandra and I had concluded that IBM could no longer tolerate Misek-Falkoff's absences, disruptive behavior and lack of productivity. We were prepared to terminate her for those reasons. Because she had significant medical problems, however, we decided, in consultation with the IBM Medical and Personnel Departments, to seek disability benefits for her under MDIP rather than simply terminate her.
>
> 12. The decision to place her on MDIP was made in June 1987 by IBM's Medical Disability Panel[43] . . .

The inescapable fact is that they did not fire her (they did not have grounds to fire her, albeit they could have done it "for no cause"), but they did put her on permanent disability. They could not have done this if she were not handicapped or perceived as handicapped. Thus, on the one hand they claim they could have acted without relying on

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[43] Why did more than 18 months elapse between the decision that Dr. Misek-Falkoff's overall performance could not be "tolerated" and her actual severance from the workplace? Why was it so important for IBM to place the employee on MDIP instead of firing her that they kept her on for a year and a half, and gave her a salary increase (denoting more than satisfactory performance) in October 1986?

the handicap, and on the other they admit to such reliance in order to do what they actually did. The lower court erred in favoring the movant in this possibly ambiguous situation and thereby failing to decide that the plaintiff was placed on MDIP solely on the basis of her handicap.

CONCLUSION

Wherefore, in view of the foregoing, the order and judgment appealed from should be reversed and the case should be remanded to the lower court for trial, and plaintiffs should be granted all such reliefs as the court may deem just in the circumstances.

Respectfully submitted

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